Supreme Court, U.S.
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In the Supreme Court of the United States

October Term, 1988

TOM WAYNE SCOTT, Etc.,
Petitioner,

against

State of INDIANA,
Supreme Commission, *et al.*,
Respondents.

On Writ of Certiorari
to the Supreme Court of Indiana

BRIEF FOR RESPONDENT
IN OPPOSITION

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QUESTIONS PRESENTED

In 1983, the prosecutor for Marion County, Indiana, filed a civil action against the 4447 Corporation and others. Previously, police officers had purchased, on several occasions, sexually explicit films at adult stores owned by the defendants. The prosecutor's action sought the civil forfeiture of assets acquired or maintained by an "enterprise" engaged in a "pattern of racketeering activity," that is, multiple sales of "obscenity." He also sought divestiture of other assets, the suspension of certain licenses, and the forfeiture of certain corporate charters. The defendants' future expressive conduct was not to be restricted. Trial was set for 72 hours after the action was filed. As part of his action, the prosecutor obtained a pretrial order that permitted defendants to continue to operate in the normal course of their business, but restrained them from dissipating their assets before final judgment.

Restated, four issues are presented:

(1) Did the incorporation of "obscenity" into Indiana RICO make it unconstitutionally vague on its face? (no)

(2) Did the preliminary restraining order issued under Indiana RICO constitute an impermissible prior restraint on free speech under the First and Fourteenth Amendments? (no)

(3) Would the granting of the final forfeiture order under Indiana RICO constitute an impermissible prior restraint on free speech under the First and Fourteenth Amendments? (no)

(4) Would the granting of the final divestiture, suspension of license, and forfeiture of corporate charter order under Indiana RICO constitute an imper-

missible prior restraint in free speech under the First and Fourteenth Amendments?* (no)

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* The parties of record include as appellants in the Indiana Supreme Court:

4447 Corporation, World Video Systems, I.S.S.I. Theatre Corporation, Plaza Entertainment Center, Burton Gorelick, Cinema Blue of Fort Wayne, Inc., Erotic House Bookstore, Inc., Fort Wayne Books, Inc.

The parties of record include as appellees in the Indiana Supreme Court:

The State of Indiana; Stephen Goldsmith, Prosecuting Attorney for the 19th Judicial Circuit, and Stephen M. Sims, Prosecuting Attorney for the 38th Judicial Circuit.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-470

FORT WAYNE BOOKS, INC.,
Petitioner,

-against-

STATE OF INDIANA,
STEPHEN GOLDSMITH, *et al.*,
Respondents.

On Writ of Certiorari
to the Supreme Court of Indiana

BRIEF FOR RESPONDENT STEPHEN GOLDSMITH

OPINIONS BELOW

The Indiana Supreme Court's opinion is reported at *4447 Corporation v. Goldsmith*, 504 N.E.2d 559 (Ind. 1987). The order and opinion denying rehearing are reported at 509 N.E.2d 174 (Ind. 1987). The Indiana Court of Appeals' opinion is reported as *4447 Corporation v. Goldsmith*, 479 N.E.2d 578 (Ind. App. 1985).

JURISDICTION

The judgment of the Supreme Court of Indiana was entered on March 2, 1987. Rehearing was denied on June 18, 1987. A petition for certiorari was filed within 90 days. It was granted on March 7, 1988. 108 S. Ct. 1106. Jurisdiction of this Court rests on 28 U.S.C. § 210(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution

Amendment 1

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances.

Amendment 14, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Indiana Statute

The text of the *Ind. Code Ann.* §§ 35-45-6-1, 34-4-30.5-1 (Burns Supp. 1982) is printed in Appendix A to this brief.

STATEMENT OF THE CASE

This petition reviews two separate civil actions consolidated by the Indiana Court of Appeals. This brief deals solely with the proceeding brought against the 4447 Corporation, I.S.S.I. Theatre Corporation, Plaza Entertainment Center and Burton Gorelick ("the Gorelick defendants"), which was initiated by Respondent Stephen Goldsmith ("Goldsmith"). Goldsmith filed a civil action against the Gorelick defendants. (R. 103).[1] He sought

[1] Citations to the Record are as follows:
R. refers to the Joint Appendix.
A. refers to Appendix B to this brief.

certain injunctive, forfeiture and suspension or revocation relief. (R. 112). While permitting conduct in the normal course of their business to continue, he also sought to prevent the dissipation prior to judgment of assets that were subject to forfeiture. (R. 111-12). The trial court granted the preliminary order. (A. 3) An appeal was immediately taken; the proceedings were consolidated with litigation brought against Petitioner Fort Wayne Books, Inc.; and the Court of Appeals continued the preliminary relief. (R. 134) The Court of Appeals reversed. 479 N.E.2d 578. In turn, the Indiana Supreme Court reversed the Court of Appeals. 506 N.E.2d 559. This Court then granted certiorari. 108 S. Ct. 1106.

The Gorelick defendants were alleged to own and run several so-called adult bookstores and video retail stores in Indianapolis, Indiana. (R. 105-06). The stores were operated solely for the purpose of distributing sexually explicit material and sexual aid devices. The three stores in question were Burton Gorelick and I.S.S.I. Theatre Corporation, doing business as Adult Toy and Gift, and located at 6755 E. 38th Street; 4447 Corporation, doing business as World Video Systems, and located at 4447 N. Keystone; and a store that was being constructed, but had not yet opened, Plaza Entertainment Center, located at 4276 W. 38th Street. (R. 105-06). Nothing in the record indicates that these stores, which were operated as a unit, distributed any other materials that had any arguably serious literary, artistic, political or scientific value.

On July 25, 1983, Detective Sergeant Thomas R. Rogers of the Indianapolis Police Department was alleged to have entered the Adult Toy and Gift store. (R. 117). Rogers could immediately see the store's display of sexually explicit magazines, books, video tapes, films and sexual aid devices, all of which was available for sale to the public. (R. 117). Rogers purchased two films, "Anal Madness" and "Spin the Bottle". (R. 117). The covers

of the films graphically displayed deviate sexual acts. (R. 117). In the films, men and women performed sexual intercourse and deviate sexual acts. (R. 117). The clerk in the store acknowledged that the covers accurately depicted the contents of the materials. (R. 117).

Rogers approached a "conversation booth" within the "live peep" section of the Adult Toy and Gift store. (R. 117). The booth was divided into two sections with a telephone allowing conversation between the sections. (R. 117). Rogers entered the booth and spoke to a female identified as "Shawn" in the other section of the booth. (R. 117). Shawn instructed Rogers to put money inside a coin operated machine that controlled the lights to the other section. (R. 117). When Rogers inserted money into the device, the lights came on in Shawn's side of the booth, and they gave Rogers a full view of her. (R. 117). Shawn then told Rogers that for a "tip" she would "get naked" for him. (R. 117). Rogers paid Shawn more money, and Shawn removed all of her clothing. (R. 117). Shawn laid down on the floor, spread her legs and genitals apart with her fingers, and she exposed her private parts and anus to Rogers. (R. 117-18). Shawn then proceeded to masturbate until the time expired on the coin operated light machine. (R. 118).

Rogers turned his investigation to the World Video Systems store. (R. 118). There, Rogers encountered a similar wide array of sexually explicit materials, all of which were available for sale to the public. (R. 118). Rogers talked with the manager, Cynthia Smith, about a video tape, called "Hot Summer Night," which was on public display. (R. 118). Smith informed Rogers that he probably would not like the film because "it was pretty rough." (R. 118). Consequently, Rogers purchased two other films, entitled "Afternoon Delight" and "Sexual Negotiations." (R. 118). The covers of the films showed in detail sexual acts. (R. 118). In the films, men and women performed sexual intercourse and deviate sexual acts. (R. 118).

The next day, Rogers returned to Adult Toy and Gift store. (R. 119). He purchased two more films, entitled, "Big Load" and "Gyro Sex." (R. 119). In these films, men and women performed sexual intercourse and deviate sexual acts. (R. 119).

Meanwhile, Officer Steve Verplank went to World Video Systems. (R. 119). He purchased "Hot Summer Nights," the same film that Rogers had discussed with Smith the previous day. (R. 119). In this tape, four men raped a young woman and forced her to perform oral sex with them. (R. 119). The men also beat the woman with a belt. (R. 119).

Nothing in the record indicates that the films purchased by the detectives at the two stores had any arguably serious literary, artistic, political or scientific value.

On July 29, 1983, Detective Joseph Brannon began an investigation of the new store. (R. 119). He went to the Plaza Entertainment Center. (R. 119). The store appeared to be open for business, and Brannon discovered magazines, films and other sexually explicit material ready for sale to the public. Upon entering the store, however, Brannon saw that construction on the building was not finished. (R. 119). One of the workers told Brannon that the store would be opening the following Monday, August 1. (R. 119). The worker also showed Brannon the mini-theatre section, which was scheduled to be completed in the following months; he also showed him the "live peep" section, where customers could pay to see women perform sex acts. (R. 119-20).

Rogers continued his investigation, which consisted of interviews and obtaining various papers, records, applications and other legal documents, which related to Adult Toy and Gift and World Video Systems. (R. 120). These interviews and documents established that the Gorelick defendants owned and operated these two stores and the one to be opened. (R. 120).

On Monday, August 1, 1983, Goldsmith, Prosecuting Attorney for the Nineteenth Judicial Circuit of Indiana, filed a civil action in Marion Circuit Court under *Ind. Code Ann.* § 34-4-30.5-3(a) (Burns Supp. 1982). (R. 103). Goldsmith's complaint alleged that the Gorelick defendants, the various individuals and corporations, constituted an "enterprise," a group of related individuals and corporations that operated as a continuing unit, which was engaged in a "pattern of racketeering activity." (R. 107-08). The pattern of racketeering activity consisted of the commercial distribution and exhibition of obscene materials, including live paid sexual performances, which were tantamount to prostitution. (R. 108-10). Goldsmith sought various forms of civil relief, including injunctions, divestiture, forfeitures and suspension or revocation of licenses and corporate charters. (R. 111-12).

On the same day, Goldsmith filed a Verified Petition for Seizure of Property Subject to Forfeiture. (R. 113). The petition was designed to freeze, prior to final judgment, the assets of the Gorelick defendants; it also required them to prepare an inventory of their real and personal property. (R. 115-16). In support of this petition, Goldsmith submitted the affidavit of Detective Rogers and the films that the officers had purchased from the Gorelick defendants' stores. (R. 114).

After reviewing the materials submitted to the Court, including viewing the films, the Marion Circuit Court found that there was probable cause to believe that the Gorelick defendants had violated the Indiana statute. (A. 2-3). The Court then ordered the Gorelick defendants to preserve all property located at Adult Toy and Gift and World Video Systems. (A. 3). Specifically, the Court directed the Gorelick defendants not to "transfer or remove from said buildings any fixtures, cabinets, cameras, audio or video equipment, cash registers or other property until further order of the court." (A. 3). The

Court, however, specifically limited its freeze order to non-expressive material, emphasizing that its order did "not prevent [the Gorelick defendants] from transferring or selling books, magazines, newspapers or video tapes." (A. 3). The Court also ordered the police to secure all property within the unopened Plaza Entertainment Center. (A. 3). Trial was set for 72 hours later, the following Thursday, August 4, 1983. (A. 3).

Despite the need for a quick adjudication of Goldsmith's claims, the Gorelick defendants delayed the trial on the merits. (R. 121). First, they intervened in the proceedings on August 4, 1983, and they moved to continue the date of the trial. (R. 121). Having succeeded, the Gorelick defendants then moved for a change of venue, which resulted in the transfer of the proceeding to the Hamilton Circuit Court. On September 8, 1983, Goldsmith filed an amended complaint, narrowing the scope of the remedies he sought, but not otherwise altering the basic character of the proceedings. (R. 123). Goldsmith abandoned his request for general injunctive relief. (R. 129-30). Instead, he requested an order limited to preventing the dissipation of assets "without prior approval of the Court." (R. 129-30). The Gorelick defendants then moved to dismiss the Complaint and to vacate the Court's freeze order. They contended that the Indiana statute and the freeze order infringed upon their right to freedom of speech under the First and Fourteenth Amendments to the United States Constitution. *4447 Corp. v. Goldsmith*, 504 N.E.2d 559, 562 (Ind. 1987).

After an adversarial hearing, on December 21, 1983, the Hamilton court denied both motions to dismiss and the motion to vacate the freeze order. Pursuant to Ind. R. App. P. 4(B)(6), the Court then certified for appeal the question of whether a court order freezing assets can properly be issued based upon obscenity violations that have not been litigated. The Court of Appeals granted a

stay of the Circuit Court order sealing the unopened store, but continued the freeze order, and the Gorelick defendants pursued their interlocutory appeal. (R. 133).

The Indiana Court of Appeals consolidated the Gorelick defendants' proceeding with the Fort Wayne Books, Inc. proceedings.[2] The Court of Appeals struck down the Hamilton court's freeze order. *4447 Corporation v. Goldsmith*, 479 N.E.2d 578, 585 (Ind. App. 1985). The Indiana Supreme Court, however, reversed the Court of Appeals, and it held that the Indiana statute did not violate the defendant's free speech rights by allowing, subject to constitutionally appropriate procedures, the forfeiture of assets based upon a predicate offense of "obscenity." *4447 Corp. v. Goldsmith*, 504 N.E.2d 559 (Ind. 1987). This Court then granted certiorari. 108 S. Ct. 1106.

[2] However similar, the two proceedings are distinguishable in crucial aspects. Most importantly, Goldsmith did not seek to prohibit the Adult Toy and Gift store and the World Video Systems from continuing to operate. Nor did the trial court's order attempt to prevent the Gorelick defendants from continuing their business. Goldsmith did not attempt to seize any expressive materials, and he only sought to prevent certain assets from being dissipated before judgment. Moreover, an adversary trial would have taken place 72 hours after the Complaint and Petition were filed, but it was delayed, not because of conduct of Goldsmith, but by the motions and related procedural efforts of the Gorelick defendants. The differences in the three cases accepted for *certiorari* are summarized in the chart at the end of this section.

Defendants	Case Type	Previous Convictions	Pretrial Orders: Re Books	Pretrial Orders: Other Assets	Stay & Pretrial Appeal
1. Ft. Wayne Books (3 stores)	Civil	39	Yes	Yes	Yes
2. Sappenfeld (Kokomo)	Criminal	No	No	No	Yes
3. 4447 Corp. et al. D/B/A	Civil				
World Video		No	No	Yes	Store Burned
Adult Toy & Gift		No	No	Yes	Yes [2]
Plaza Entertainment		No	No [1]	Yes	Yes [2]

[1] Court set hearing 72 hours after filing on whether new store should open; restricted sales from that *place* (new store) only until hearing.

[2] Stores closed by guilty plea to federal RICO (arson, mail and tax fraud). *See U.S. v. Gorelick*, IP86-29-CR-01, S.D. Ind.; state action continues against other defendants.

SUMMARY OF ARGUMENT

Indiana's RICO statute is modeled on similar Federal and state RICO legislation. Congress enacted the Organized Crime Control Act in 1970. Title IX of the 1970 Act is known as "RICO." Since 1970, a majority of states, including Indiana, have adopted similar, but not identical, legislation. RICO legislation is designed to curtail the infiltration of organized crime into legitimate businesses, but its scope is not confined to that purpose. RICO legislation applies to patterns of unlawful conduct by, through, or against enterprises; its enforcement mechanisms include a variety of criminal and civil sanctions.

In 1970, Congress did not include "obscenity" among RICO's predicate offenses. In 1984, Congress added "obscenity" to RICO's list of predicate offenses, since by

then it had become a major source of income for organized crime figures.

Twenty states, including Indiana, incorporate "obscenity" among the predicate offenses of their RICO statutes.

Federal RICO is enforced by criminal forfeiture. A number of the state statutes, including Indiana's, embody criminal, and civil forfeiture. Criminal and civil forfeitures are an often-used and a well-recognized form of sanction, whose basic constitutionality is today recognized to be beyond serious question.

RICO legislation is not vague in itself. Nor does RICO legislation become vague when "obscenity" is made a predicate offense, since "obscenity" is not vague.

A pretrial restraining order that freezes assets subject to seizure that are not expressive, and that permits the continuation of a business during the course of litigation is not an impermissible prior restraint on free speech.

A civil forfeiture order under RICO legislation is not an impermissible prior restraint on free speech where the legislation falls within the constitutional power of a state, the order furthers a substantial governmental interest, the interest is unrelated to free expression, and the order's incidental impact on free expression is not greater than necessary under the circumstances.

Similarly, civil orders that require the divestiture of assets, the suspension or revocation of licenses, or the forfeiture of corporate charters, but do not restrict future expressive conduct, do not constitute an impermissible prior restraint on free speech, since the order's incidental impact on free expression is not greater than necessary under the circumstances.

ARGUMENT

I. RICO LEGISLATION IS NOT LIMITED TO EITHER ORGANIZED CRIME OR THE INFILTRATION OF LEGITIMATE BUSINESS

A. Background of RICO

In 1970, Congress enacted the Organized Crime Control Act, Title IX of which is known as "RICO." It is codified at 18 U.S.C. §§ 1961-68 (1982).[3] Since 1970, a majority of the states, including Indiana, have adopted similar, but not identical, legislation.[4] Even so, criminal and civil litigation under the legislation is a relatively recent phenomenon. It will be helpful, therefore, to set out the legislative background of the Federal and state statutes.

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[3] *See generally*, Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 Temp. L. Q. 1009 (1980) (cited as "Basic Concepts"); Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 Notre Dame L. Rev. 237 (1982) (cited as "Civil Action").

At first, the Department of Justice moved slowly to use RICO criminally. Today, it is the prosecutor's tool of choice in organized crime, political corruption, white-collar crime, terrorism, and hate-group prosecutions. *See Oversight on Civil RICO Suits*, Hearings Before the Senate Committee on the Judiciary, 99th Cong., 1st Sess. 109-11 (1985) (testimony of Assistant Attorney General Stephen S. Trott). The Department of Justice has also begun to implement the civil provisions. *See, e.g., United States v. Local 560, International Brotherhood of Teamsters*, 581 F. Supp. 279 (D.N.J. 1984), *aff'd*, 780 F.2d 267 (3d Cir. 1985) (civil suit against organized crime controlled union), *cert. denied*, 106 S. Ct. 2247 (1986).

[4] Twenty-seven states have adopted legislation similar, but not identical to, Federal RICO. The statutes are analyzed and compared in Appendix A to Blakey and Cessar, *Equitable Relief Under Civil RICO: Reflections on Religious Technology Center v. Wollersheim—Will Civil RICO be effective Only Against White Collar Crime?*, 62 Notre Dame L. Rev. 526, 596 (1987).

The "legislative history [of Federal RICO] clearly demonstrates that . . . [it] was intended to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots." *Russello v. United States*, 464 U.S. 16, 26 (1983). "[T]he major purpose of Title IX . . . [was] to address the infiltration of legitimate business by organized crime." *United States v. Turkette*, 452 U.S. 576, 591 (1982).[5]

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[5] But Congress wanted to reach both "legitimate" and "illegitimate" enterprises. *Turkette*, 452 U.S. at 590. "[R]ejected [also has been the] notion [that RICO] applies only to organized crime in the classic 'mobster' sense." *United States v. Grande*, 620 F.2d 1026, 1030 (4th Cir.), *cert. denied*, 449 U.S. 919 (1980). *See also, Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 495 (1985) ("not just mobsters"). In addition, the "courts are all but unanimous in their refusal to read RICO as prohibiting *only* the infiltration of legitimate organizations . . ." *United States v. Altomare*, 625 F.2d 5, n.7 (4th Cir. 1980) (emphasis added). *See also, Turkette*, 452 U.S. at 591. RICO, in short, applies to enterprise criminality, that is, patterns of unlawful conduct by, through, or against enterprises. *See United States v. Cauble*, 706 F.2d 1322, 1330 (5th Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984); Goldsmith, *RICO and Enterprise Criminality*, 88 Col. L. Rev. 774 (1988).

RICO fits well into a consistent practice of the Congress over the past half century of enacting legislation aimed at a specific target, but made applicable generally. *See, e.g.*, 18 U.S.C. § 244 (sports bribery) held not limited to organized crime in *United States v. Walsh*, 544 F.2d 156, 159 (4th Cir. 1976), *cert. denied*, 429 U.S. 1093 (1977); 18 U.S.C. § 841-48 (explosives) held not limited to organized crime in *United States v. Schwanke*, 598 F.2d 575, 578 (10th Cir. 1979); 18 U.S.C. § 891 (loan sharking) held not limited to organized crime in *United States v. Keresty*, 465 F.2d 36, 43 (3d Cir.), *cert. denied*, 409 U.S. 991 (1972); 18 U.S.C. § 1510 (obstruction of criminal investigation) held not limited to organized crime in *United States v. Koehler*, 544 F.2d 1326, 1330 n.6 (5th Cir. 1977); 18 U.S.C. § 1951 (extortion) held not limited to racketeering in *United States v. Culbert*, 435 U.S. 371, 373-74 (1978); 18 U.S.C. § 1952 (Travel Act) held not limited to organized crime bribery in *Perrin v. United States*, 444 U.S. 37, 46 (1979); 18 U.S.C. § 1953 (lottery tickets) held not limited to organized crime in *United States v. Fabrizio*, 385 U.S. 263, 265-67 (1966); 18 U.S.C. § 2113(b) (bank robbery) held not limited to

Title 18 U.S.C. § 1962(a)-(d) (1982) sets forth standards of "unlawful" conduct, which are enforced through criminal and civil sanctions. Section 1963 of Title 18 sets out the criminal remedies; Section 1964 of Title 18 sets out the civil remedies.[6] Section 1962 states what is "unlawful," not "criminal." As such, RICO is not, as some courts have thought, "primarily a criminal statute."[7] Accordingly, because the civil scope of RICO is *broader* than its criminal scope, Federal RICO is *not* primarily criminal and punitive, but primarily civil and remedial.[8]

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gangsters in *Bell v. United States*, 462 U.S. 356, 358-62 (1983); 18 U.S.C. § 2421 (white slave traffic) held not limited to commercial prostitution in *Caminetti v. United States*, 242 U.S. 470, 485-90 (1917); 18 U.S.C. § 3575 (sentencing) held not limited to organized crime in *United States v. Schell*, 692 F.2d 672, 674 (10th Cir. 1982).

[6] *See Sedima*, 473 U.S. at 489; *Basic Concepts* at 1921, n.71; *Civil Action* at 343, n.20. The criminal remedies include imprisonment, fine, and forfeiture. The civil remedies include divestment, future restrictions, dissolution and reorganization; the private civil remedies include treble damages and attorneys fees.

[7] *See, e.g., In Re Action Industries Tender Offer*, 572 F. Supp. 846, 849 (E.D. Va. 1983). "Person" ("individual" or "entity") defines the class who may be sued civilly for violations of § 1962 under § 1964, but "whoever" ("individual," "corporate body," but *not* "governmental unit") defines the class who may be indicted for violations for § 1962 under § 1963. *See generally, Civil Action* at 243 n.20.

[8] *See Sedima*, 473 U.S. at 497-99; *Turkette*, 452 U.S. at 593 (RICO is "both preventive and remedial"). *See also*, 115 Cong. Rec. 6993 (1969) (statement of Sen. Hruska regarding S. 1623, the immediate predecessor to S. 1861, from which Title IX was partially drawn, "The criminal provisions are intended primarily as an adjunct to the civil provisions, which I consider as the more important feature of the bill."); 116 Cong. Rec. 602 (1970) (statement of Sen. Hruska) ("principal value of . . . legislation . . . in civil provisions"). RICO's civil remedies, based on a showing of the preponderance of the evidence, are available to the government

Congress directed that Federal RICO "be liberally construed to effectuate its remedial purposes." 84 Stat. 941 (1970). *See Sedima*, 473 U.S. at 497-99; *Russello*, 464 U.S. at 27. ("[T]his is the only substantive federal criminal statute that contains such a directive. . .").[9]

This Court, too, has recognized Congress' plain intent. Federal "RICO is to be read broadly," and "is to 'be liberally construed to effectuate its remedial purposes . . .'" *Sedima*, 473 U.S. at 497-98. Federal "RICO was an aggressive initiative to supplement old remedies and develop new methods for fighting crime . . . [and] it is in this spirit that all of the Act's provisions should be read." *Id.*

The background of the Indiana RICO statute is consistent with the understanding of this Court of the background of Federal RICO expressed in *Russello* and *Turkette*. 504 N.E.2d at 564.

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or other litigants. *United States v. Cappetto*, 502 F.2d 1351, 1357 (7th Cir. 1974) (government suit), *cert. denied*, 420 U.S. 925 (1975); *Wilcox v. First Interstate Bank of Oregon*, 815 F.2d 522, 530-32 (9th Cir. 1987) (private suit). *See Sedima*, 473 U.S. at 491 ("[N]o indication . . . depart from [preponderance]").

[9] The liberal construction clause is not unique in state law. It had its origins in the codification movement of the 19th century. Judicial hostility to change through legislation was common at the time. W. Hurst, The Growth of American Law 186 (1950). Legislatures reacted: "[I]t became standard practice in drafting statutes to insert a preamble stating broadly the purpose of the act and to close with a provision declaring that the statute should be liberally construed." D. Wigdor, Roscoe Pound: Philosopher of Law 174 (1974). In fact, a majority of states have abolished the common law rule. The statutes are collected in *Civil Action* at 245 n.25. Judicial hostility continues. *See Sedima*, 473 U.S. at 529 (Powell, J., dissenting) (liberal construction applies only to criminal provisions); *accord, Saine v. A.I.A., Inc.*, 582 F. Supp. 1299, 1305 (D. Colo. 1984) (Kane, J.). Strict construction is a common law rule; it is not a constitutional mandate. *Tarrant v. Ponte*, 751 F.2d 459, 466 (1st Cir. 1985).

B. Application of RICO: Obscenity

Section 1962(c) of Title 18 embodies certain substantive elements: (1) employment by or association of a defendant with (2) an "enterprise" (3) the affairs of which are conducted by or participated in by the defendant "through a pattern of racketeering activity." *United States v. Griffin*, 660 F.2d 996, 999 (4th Cir. 1981). *Sedima*, 473 U.S. at 496. ("A violation of § 1962(c) . . . requires (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.") The substantive provisions of Indiana's RICO statute are "essentially patterned" after Federal RICO. 504 N.E.2d at 560.

Section 1961(1) of Title 18 defines "racketeering activity." The definition includes criminal offenses under specified Federal or state laws, which deal with (1) violence, (2) provision of illegal goods and services, (3) corruption in the labor movement or among public officials, and (4) commercial and other forms of criminal fraud. *Civil Action* at 300-06.

In 1970, "obscenity" was not a predicate offense under Federal RICO. "Obscenity" was added in 1984, since its manufacture and distribution had by then become a major organized crime activity. 130 Cong. Rec. 433-57 (daily ed. Jan. 30, 1984) (statement of Sen. Helms) ("third largest source of income for organized crime"). Similarly, twenty states, including Indiana, now incorporate "obscenity" among the predicate offenses of their RICO statutes.[10]

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[10] Ariz. Rev. Stat. Ann. § 13-2301 (1978 & Supp. 1984-85); Cal. Penal Code § 186.2 (West Supp. 1985); Colo. Rev. Stat. § 18-17-103 (Supp. 1984); Conn. Gen. Stat. § 53-394 (West Supp. 1984); Del. Code Ann. tit. 11, § 1502 (1986); Fla. Stat. § 895.02 (West Supp. 1983); Ga. Code Ann. § 16-14-3 (1983); Hawaii Rev. Stat. § 842-1 (1976); Idaho Code § 18-7803; Ind. Code § 35-45-6-1 (Burns Supp. 1982); N.J. Rev. Stat. § 2C (West Supp. 1982): 41-1; N.D. Cent. Code § 12.1-06.1-10 (Supp. 1984); N.Y. Penal Law § 460.10 (1986); N.C. Gen. Stat. § 190.1 (1986); Ohio Rev. Code

C. Sanctions of RICO: Criminal and Civil

Federal and state RICO legislation is enforced through a wide range of criminal and civil sanctions. In particular, the legislation embodies criminal and civil forfeitures. Such forfeitures have long been employed in the law. For example the standards of proof differ since criminal RICO may also result in imprisonment. Yet, their basic constitutionality is also established beyond serious question. They are part of the basic fabric of our law.

The Indiana statute allows either civil or criminal actions, both of which may result in forfeiture. Nothing that Goldsmith did in employing the civil forfeiture provisions departed from long-used and well-recognized law enforcement techniques. "Upon this point a page of history is worth a volume of logic." *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921) (Holmes, J.).

Federal RICO embodies criminal forfeiture. Most Federal and state legislation enacted in the post-Civil War period, however, provided for civil forfeiture.[11] Indeed, a number of other state statutes today embody various kinds of civil, not criminal, forfeitures.[12] Both criminal and civil forfeitures have ancient roots.

Ann. § 2907.31 (Page 1985); Or. Rev. Stat. § 155.714 (1981); R. I. Gen. Laws § 7-15-1 (Michie Supp. 1983); Utah Code Ann. § 76-10-1602 (Smith Supp. 1983); Wash. Rev. Code § 9A.82.010 (West Supp. 1985); Wis. Stat. Ann. § 946.82 (West Supp. 1984-85).

[11] For an excellent review of the historical materials, *see generally*, Note, *Bane of American Forfeiture Law*, 62 Cornell L. Rev. 768 (1977) (cited as "Forfeiture").

[12] At the same time, Congress enacted RICO, it enacted the Comprehensive Drug Abuse Prevention and Control Act. 84 Stat. 1236 *codified* at 21 U.S.C. § 801 *et seq.* While RICO included criminal forfeiture provisions, the Drug Act included both criminal and civil forfeiture provisions. 21 U.S.C. § 848 (criminal); 21 U.S.C. § 881 (civil). The civil forfeiture provisions, too, have been upheld against various challenges. *See, e.g., United States v. One 1978 Mercedes Benz Four-Door Sedan*, 711 F.2d 1297, 1300-03 (5th Cir. 1983). Following the 1970 Drug Act, the National Conference of Commissioners on Uniform State Laws also adopted the Uniform Controlled Substances Act. 9 Uniform Law Annotated 187 (Supp. 1983). The Uniform Controlled Substances Act provides for civil forfeitures; the Act contains no criminal forfeiture provision. The civil forfeiture provision is Section 505; it parallels the civil forfeiture provision of the Federal Drug Act. *Id.* at § 505, p. 611-14. Forty-six states have adopted the Uniform Act. *Id.* at 78. A majority of the twenty-seven states that have RICO statutes provide for civil forfeiture of property. The provisions parallel the 1970 Drug Act and the Uniform Act. *See, e.g.*, Ariz. Rev. Stat. Ann. § 13-2314 (Supp. 1983); Colo. Rev. Stat. § 18-17-106 (Supp. 1984); Del. Code Ann. Title 11, § 1505(6) (1986); Fla. Rev. Stat. Ann. § 895.05 (West Supp. 1983); Ga. Code Ann. § 26-3401 (1983); Ind. Code Ann. § 34-4-30.5-4 (Burns Supp. 1982); Miss. Code Ann. § 97-43-9-2 (Layers Co-op 1984); Nev. Rev. Stat. § 207.4-17 (1983); N.J. Stat. Ann. § 2C: 41-4 (West Supp. 1982); N.C. Gen. Stat. § 75-D-5 (1986); N.D. Cent. Code § 12.1-06.1-05 (Smith Supp. 1983); Or. Rev. Stat. § 155.725(3) (Smith Supp. 1983); R. I. Gen. Laws § 7-15-3-1 (Michie Supp. 1985); Wis. Stat. Ann. § 946.86 (West Supp. 1983-85).

Biblical,[13] Greek,[14] and Roman [15] law knew of forms of forfeiture. So, too, did English law. The forfeiture of property is one of the earliest sanctions of Anglo-Saxon law. Three types of forfeitures came to be distinguished: statutory forfeiture, forfeiture consequent to a criminal conviction and attainder, and deodand. Statutory forfeitures and forfeitures consequent to a criminal conviction merit discussion.

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[13] *Exodus* 21:28. ("If an ox gore a man or woman, that they die: then the ox shall be surely stoned, and his flesh shall not be eaten; but the owner of the ox shall be quit.")

[14] *See* O. Holmes, the Common Law at 8 (1881).

[15] 7 Twelve Tables 1, *translated in*, I. Scott, The Civil Law at 69 (1932). ("If a quadruped causes injury to anyone, let the owner tend him the estimated amount of the damage; and if he is unwilling to accept it, the owner snall . . . surrender the animal that caused the injury.")

Statutes in England imposed a variety of forfeitures, principally as a means of tax enforcement. In the mid-seventeenth century, Parliament enacted the Navigation Acts, the broadest of the English forfeiture statutes, which required that shipping had to be in English-built, -owned, and -manned vessels, and they provided that violations would result in the forfeiture of the ship and the goods it carried.[16] Suits for these forfeitures were commenced by civil information. They could be brought against a person (*in personam*) or against the thing to be forfeited (*in rem*). Typically, they were brought *in rem* against the vessel and the goods, as the owner could not be located or was beyond the jurisdiction of the court.[17]

Forfeiture consequent to a criminal conviction and attainder was, however, the oldest and best known. It was imposed on traitors and felons, who forfeited all of their personal and real property, not as a result of their conviction, but of their attainder, a pronouncement of legal death.[18] Attainder also means corruption of blood, that is, no descendant could ever trace a line of inheritance through the attained ancestor. Forfeiture of lands related back to the time of the commission of the offense, voiding subsequent sales or encumbrances. Forfeiture of

[16] L. Harper, The English Navigation Laws: A Seventeenth-Century Experiment in Social Engineering at 109, 387-414 (1964).

[17] *See, e.g.* III W. Blackstone, Commentaries at 262.

[18] *See, e.g.*, IV W. Blackstone, Commentaries at 374-381. "Felony" under early English law included any breach of the feudal engagement. M. Radin, Anglo-American Legal History at 234 (1936). As such, it resulted in the forfeiture of the feudal estate to the lord. *Id.* at 240. Blackstone traces the origins of the word "felony" to the Anglo-Saxon "fee" (estate) and "lon" (price). IV Blackstone, *id.* at 95-96. Chatels went to the king, whose regalian rights included all ownerless property—*bona vacantia*, which is what an outlaw's property was. Radin, *id.* at 240.

goods did not relate back, but transfers collusively made, that is, not *bona fide*, were not good against the crown.[19]

In the American colonies, the extent to which English law and practice should be adopted was a matter of great dispute.[20] Forfeitures did not follow any uniform practice. For example, forfeiture consequent to conviction and attainder was largely abolished in Massachusetts,[21] allowed to fall into disuse in New York,[22] but was fairly widely employed in Pennsylvania[23] and Virginia.[24] The acceptance of deodand presents a cloudier picture, and firm judgments cannot be made on the scope of its adoption.[25] Finally, while the crown did not insist on most forfeitures, since the proceeds would have gone to the colonial governments, it did insist on the enforcement of the Navigation Acts, which by their terms were ap-

[19] Deodands are sometimes spoken of as predecessors of the forfeiture statutes, but the historical evidence indicates that they were atypical. *Compare, Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680-683 (1974) *with* Forfeiture at 771-772. An instrument of death replaced the slayer's kin as the object of vengeance. At first the instrument was taken and sold and the proceeds used to buy Masses for the victim. *Calero-Toledo*, 416 U.S. at 681. Throughout the later Middle Ages, the king received the money, which provided a small, but steady source of revenue.

[20] 1 J. Story, Commentaries on the Constitution of the United States at §§ 163-65, 187-197 (Cooley 4th ed. 1873).

[21] V N. Dane, A General Abridgement and Digest of American Law at 4 (1824).

[22] J. Goebel and T. Naughten, Law Enforcement in Colonial New York at 713-713, 716 (1944) (cited as "Goebel"). New York juries simply found nothing to forfeit. *Id.*

[23] *See, e.g., Respublica v. Doan*, 1 U.S. (Dall.) 86, 91 (Pa. 1784) (forfeiture following outlawry).

[24] A. Scott, Criminal Law in Colonial Virginia at 109 (1930).

[25] *Compare* Goebel at 717 *with* S. Pennypacker, Pennsylvania Colonial Cases at 70 (1892).

plicable to the colonies.[26] They were enforced in the vice-admiralty courts, in effect, not *in rem*, but *in personam*, and they were tried by the court without a jury.[27]

Following the Revolution, a variety of statutes continued the practice of declaring specific forfeitures, which could be imposed in criminal or civil proceedings, either *in personam* or *in rem*. How a particular forfeiture was to be treated was a question of legislative intent.[28] So, too, was the time when the forfeiture was to take place, that is, at the time of the offense or at the time of the conviction.[29] The final forfeiture in the Federal courts, however, was patterned after the Navigation Acts, and it was imposed in an *in rem* proceeding. It was also early held that property could be for-

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[26] *See, e.g.*, 12 Car. 2, C. 18 ch II (1660).

[27] *See generally* Wroth, *The Massachusetts Vice Admiralty Court and the Federal Admiralty Jurisdiction*, 6 Am. J. Legal Hist. 250 (1962). After Independence, criminal forfeitures consequent to conviction and attainder fell into disrepute. The Constitution itself forbade bills of attainder—legislative, not judicial, determinations of guilt. U.S. Const. art I, § 9, cl. 3. It also limited corruption of blood and forfeitures of estate for treason to life estates. *Id.* at art III, § 3, cl. 2. In 1790, Congress abolished by statute both corruption of blood and forfeiture of estate as a consequence of Federal criminal prosecutions. 1 Stat. 117, c. 9, § 24 (1790), *codified at* 18 U.S.C. § 3563. *See United States v. Grande*, 620 F.2d 1026, 1039 (4th Cir.) (Criminal forfeiture under RICO constitutional) ("Nothing . . . suggests that either article III or the 1790 statute was intended to prohibit anything other than corruption of blood or forfeiture of estate as imposed at common law."), *cert. denied*, 449 U.S. 919 (1980).

[28] *United States v. 1960 Bags of Coffee*, 12 U.S. (8 Cranch) 398, 399 (1814).

[29] This Court described as "settled doctrine" in *United States v. Stowell*, 133 U.S. 1, 16-17 (1890) the rule that forfeiture takes place "immediately upon the commission" of the offense and the right to the property then vests in the government, although it was not "perfected" until a judicial decree was issued.

feited without prior criminal conviction[30] and that the time of forfeiture would relate back to the time of the offense, even as against a *bona fide* purchaser for value.[31] *In rem* forfeitures were rationalized by the personification fiction. Personal guilt was not implicated. The prosecution was brought, not against the owner, but the thing itself, and judgment was rendered against the whole world.

The Civil War brought about a major shift in the law of forfeiture. It quickly became evident that traditional treason prosecutions could not be brought against most rebels, for they were safely behind Confederate lines. Their life, liberty, and property—even where their property was not in the South—were beyond the power of northern courts, as *in absentia* prosecutions were not constitutionally possible. The solution hit on by Congress was civil *in rem* forfeiture proceedings.[32] The forfeitures were eventually upheld by this Court.[33] Criminal *in personam* forfeiture proceedings then largely disappeared from the Federal scene.[34] Constitutional attacks on

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[30] *The Palmyra*, 25 U.S. (12 Wheat) 1, 15 (1827). Nevertheless, this Court held in *Coffey v. United States*, 116 U.S. 436, 444-45 (1886) that if there were an acquittal in a criminal proceeding, there could not be a subsequent *in rem* forfeiture in a civil proceeding. *Coffey* was disapproved of by this Court ir *United States v. One Assortment of 89 Firearms*, 465 U.S. 354 (1984) (neither double jeopardy nor collateral estoppel precludes civil *in rem* forfeiture after criminal acquittal; civil character of proceeding question of legislative intent).

[31] *See supra* nn. 26 and 27. No right to a jury trial exists in an *in rem* forfeiture, even outside of admiralty jurisdiction. *Van Oster v. Kansas*, 272 U.S. 465, 469 (1926).

[32] *See generally* J. Randall, The Confiscation of Property During the Civil War (1913).

[33] *See generally*, III C. Warren, The Supreme Court in United States History at 138-39 (1922) for a treatment of these decisions.

[34] *See, e.g., United States v. Zucker*, 161 U.S. 475, 478 (1896).

civil *in rem* forfeitures were again launched when they were used by the Congress during Prohibition to suppress the traffic in illicit alcohol, but this Court turned them back on the basis of the established precedents of the post-Civil War era.[35] The constitutional validity of the use of *in rem* civil forfeitures in law enforcement today is, therefore, settled beyond serious question.[36] As such, the various civil forfeiture sanctions of Indiana's RICO legislation are neither particularly remarkable nor facially unconstitutional.

II. NEITHER RICO NOR ITS APPLICATION TO OBSCENITY IS UNCONSTITUTIONALLY VAGUE

A careful analysis of the steps taken by Goldsmith in these proceedings shows that his actions were well within clearly established constitutional limits. Petitioner's brief, as well as those of its Amici, however, mischaracterizes the conduct of Goldsmith by ignoring the distinctions between his conduct and that of the other Respondents. In addition, they conflate the distinct issues of vagueness, the status of the pre-trial order as a prior restraint, and import of the contemplated civil forfeiture and other orders on future expressive conduct. An indiscriminate lumping together of each of these issues under the rubric of "prior restraint" facilitates neither analysis nor decision. *See* Jeffries, *Rethinking Prior Restraint*, 92 Yale L. J. 409, 420, 434 (1983) ("The tyranny of labels is such that all things called by the same name are assumed to have the same features. . . . * * * Most regrettable of all is the demonstrated potential of the words 'prior restraint' to confound and deflect rather than to guide and clarify the analysis of important questions of First Amendment policy."); O. Holmes,

[35] *J.W. Goldsmith, Jr.-Grant Co. v. United States*, 254 U.S. 505 (1921).

[36] *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680-683 (1974).

Collected Legal Papers, 306 (1920) ("To rest upon a formula is a slumber that, prolonged, means death."). When these separate proceedings are independently examined, and when these discrete issues are considered one by one, as they must be, this petition takes on a wholly different light, and Goldsmith's conduct is seen as well within the permissible range of appropriate law enforcement procedures.

Neither RICO nor "obscenity" is unconstitutionally vague. Federal "RICO [legislation] . . . survived various void-for-vagueness challenges." *United States v. Morelli*, 643 F.2d 402, 412 (6th Cir. 1981) (cases collected). Neither "enterprise" nor "pattern," Federal RICO's two essential concepts, is unconstitutionally vague. *Compare United States v. Scotto*, 641 F.2d 47, 52-53 (2d Cir. 1980) (enterprise), *cert. denied*, 452 U.S. 961 (1981) *with United States v. Parness*, 503 F.2d 430, 441 (2d Cir. 1974) (pattern), *cert. denied*, 414 U.S. 1105 (1975). Where the predicate offenses of RICO are not unconstitutionally vague, notice to an offender of proscribed conduct and prosecutive discretion is duly provided. *See United States v. Stofsky* 409 F.Supp. 609, 612 (S.D.N.Y. 1973) (narrow predicate offense makes RICO itself narrow), *aff'd*, 527 F.2d 237 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976).

Similar state RICO legislation has passed constitutional muster, including cases in which the predicate offense was "obscenity." *See, e.g., Arizona v. Feld*, 745 P.2d 146, 148-53 (Ariz. App. 1987), *cert. denied*, 108 S.Ct. 1270 (1988); *Cantrell v. State*, 403 So.2d 977, 978 (Fla. 1981); *Bowen v. State*, 402 So.2d 1173, 1174 (Fla. 1981).

Two premises are essential to these decisions. First, RICO legislation is not unconstitutionally vague in itself. Second, "obscenity" is not unconstitutionally vague under this Court's decisions in *Pope v. Illinois* 107 S.Ct. 1918, 1920-21 (1987); *Miller v. California*, 413 U.S. 15, 23

(1973); and *Roth v. United States*, 354 U.S. 476, 485 (1957). Accordingly, RICO legislation is not unconstitutionally vague when it is applied to "obscenity." *See, e.g., Arizona v. Feld*, 745 P.2d at 148-52. *Compare Brockett v. Spokane Arcades*, 472 U.S. 491, 502-07 (1985) and, *Jacobellis v. Ohio*, 378 U.S. 184, 200 (1964) (Warren, C.J., dissenting).

This Court has, of course, long recognized that not all uses of language are protected by the First or Fourteenth Amendments. *See, e.g., Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942). "Obscenity" deserves no constitutional protection, since obscene matter plays no part in the free expression of ideas, and it is of such slight social value that any benefit that may be derived from it is outweighed by society's interest in order and morality. *Roth v. United States*, 354 U.S. 476, 484-85 (1957). *Roth* specifically rejected the proposition that obscene materials are protected by the First Amendment; it upheld a prosecution under a Federal statute punishing the mailing of "obscene, lewd, lascivious or filthy" materials. 354 U.S. at 485 ("[I]mplicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. . . .").

The test for "obscenity" was re-examined in *Miller v. California*, 413 U.S. 15 (1973). *Miller* articulated a three part test for "obscenity": 1) whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to prurient interest; 2) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and 3) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value. *Miller*, 413 U.S. at 24.[37] It held that "[s]ex and nudity [could] . . . not

[37] Justice Brennan has urged this Court to abandon the effort to distinguish between protected and unprotected material in the sphere of "consenting adults", since the effort has proved so vexing, time-consuming, and divisive. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 86-91 (1973) (Brennan, J., dissenting) (companion case to *Miller*). Justice Brennan has argued that even after all this effort, "obscenity" stubbornly "remained . . . resistant to the formulation of stable and manageable standards." 413 U.S. at 73 (Brennan, J., dissenting). The *Miller* Court disagreed. Accordingly, just as the Fourteenth Amendment is not now thought to embody Herbert Spencer's *Social Statistics*, it is not yet thought to reflect John Stuart Mill's *On Liberty*. *Compare Faris Adult Theatre I v. Slaton*, 413 U.S. 49, 68-69 (1973) (Burger, C.J.) *with Lochner v. New York*, 198 U.S. 45, 75 (Holmes, J., dissenting).

The exact intent of the Founders embodied in the First Amendment is not clear from the historical evidence. *See generally*, L. Levy, Emergency of Free Press at 320-25 (2d ed. 1985). "Obscenity" prosecutions were, however, a feature of English law prior to the Revolution. *See, e.g., Dominus Rex v. Curl*, 2 Str. 789, 93 Eng. Rep. 849 (1727). Colonies, too, prohibited obscenity by statute as early as 1711. Charter and General Laws, The Colony and Province Laws of Massachusetts Bay at 399 (1814). Reports of "obscenity" prosecutions also exist, at least in the years after the Revolution, when the reporting of decisions had become more common. *See, e.g., Commonwealth v. Sharpless*, 2 Serg. & Rawles 91 (Pa. 1815) (obscenity common law offense); *Commonwealth v. Holmes*, 17 Mass. 336 (1821) (Parker, C.J.); W. Nelson, Americanization of the Common Law at 110 (1975) (discussion of available court records). As early as 1776, the state constitutions, moreover, protected free speech. Constitution of Pennsylvania of 1776, Declaration of Rights, cl 12 ("printing press . . . free . . . no law . . . to restrain"); Constitution of Massachusetts of 1780, Art. XVI ("The right of free speech shall not be abridged"). The common law, too, considered the distribution of "obscenity" a "public nuisance." 1 H. Wood, The Law of Nuisances § 68 at 87 (3rd ed. 1893). The co-existence of the prohibition of "obscenity" and the protection of free speech has, therefore, never been established as inconsistent. *See, e.g., Commonwealth v. Stock*, 346 Pa. Super 60, 67 499 A.2d 308, 315 (1985) (Pa. constitution free speech protections not greater than Federal constitution); *Commonwealth v. United Books, Inc.*, 389 Mass. 888, 898, 453 N.E.2d 406, 416 (1983) (rejection of consenting adults test under Massa-

be exploited without limit by film or pictures exhibited or sold in places of public accommodation, anymore than live sex and nudity can be exhibited or sold without limit in such public places." *Id.* at 25-26.

Recently, this Court reaffirmed *Miller* in upholding a state prosecution for the sale of allegedly obscene materials. *Pope v. Illinois*, 107 S. Ct. 1918 (1987). *Pope* clarified, however, how the *Miller* test was to be applied. *Pope* held that the third prong of *Miller* is to be decided from the perspective of a reasonable person.

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chusetts constitution); *see also, Near v. Minnesota*, 283 U.S. at 717 (Parker, C.J. quoted on scope of Massachusetts constitution and prior restraint).

Modern theorists of free speech offer two basic rationales for its protection. Positively, A. Meikeljohn, Free Speech and Its Relation to Self Government 1-27 (1948) argues that the legitimacy of governmental decisions presupposes full participation by those who will be affected. But since "obscenity" makes no contribution to the process of self-government, it is not "speech." *See* Z. Chafee, Free Speech in the United States 150 (1941), *cited in Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). Negatively, the essence of free speech may be said to lie in Holmes' concept of a "marketplace of ideas." Speech, therefore, ought not be suppressed, since it might constitute unrecognized truth. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). *See also Frohwerk v. United States*, 249 U.S. 204, 206 (1919) (Holmes, J.) ("The First Amendment . . . cannot have been, and obviously was not intended to, give immunity to every possible use of language.") Here, too, "obscenity" is not "speech," since it is devoid of content.

If our society is to abandon this unbroken tradition and adopt a consenting adults test, it ought to come from jury verdicts reflecting changing community standards or legislative action at the local level. Then, such change will be subject to similar corrective community or legal action to vindicate society's long-standing interest in upholding basic human decency and the quality of community life. "It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine and Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City." *Miller v. California*, 413 U.S. 15, 32 (1973). *See Time*, July 21, 1986 at 22 (3 out of 4 Americans favor more strict enforcement of obscenity statutes). Nothing that has happened since 1973, save change in personnel on this Court, can be thought to have undermined the fundamental soundness of Chief Justice Burger's words in *Miller*. Accordingly, this Court ought not now read into the constitution a consenting adults test.

It cannot be persuasively argued, therefore, that the standards for determining what is "obscene" are vague or that RICO's incorporation of "obscenity" somehow inhibits the exploring of the outer limits of free expression. *See Roth*, 354 U.S. at 491-92 (quoting *United States v. Petrillo*, 332 U.S. 1, 7-8 (1947)):

> That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense. . . .

Community standards provide a sufficiently definite basis on which to predicate "obscenity" regulation. The rejection of community standards in the area of consenting adults, moreover, would have troubling consequences. If a line embodying community standards cannot be drawn in the area of consenting adults, a similar line cannot be drawn in the area of unconsenting adults or children. *See Miller v. California*, 413 U.S. 15, 28 (1973). Of necessity, the line will have to reflect community standards in each area. It is only the audience for the material that changes.

At the urging of commercial interests, this Court once read into the Constitution a regime of "freedom," which struck down child labor legislation. *Hammer v. Dagenhart*, 247 U.S. 251, 276 (1918) (textile mills) ("freedom of commerce"); *see generally*, Pound, *Liberty of Contract*, 18 Yale L. J. 454 (1908). At the urging of other commercial interests, it ought not now read into the Constitution a regime of "consenting adults" in the area of sexually explicit material. *See* G. Hegel, Philosophy of History Pt. IV, § 3 ch. 2 at 537 (Dome Library 1902) ("when liberty is mentioned we must always be careful to observe whether it is not really the assertion of private interest which is clearly designated"). No decent society

that cares about the quality of its community life ought to be constitutionally forced into that position. *See Bowers v. Hardwick*, 106 S. Ct. 2841, 2846 (1986) (no constitutional right to engage in sodomy) ("The Court is most vulnerable and comes nearest in illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution."); T. Livy, History of Rome (1854) ("Rome was originally, when poor and small, a unique example of austere virtue; then it corrupted, it rotted, it slowly absorbed vices").

Finally, the facts in this litigation amply demonstrate that prosecution is possible—indeed routinely possible—without approaching the hypothetically marginal case where the distinction between "obscenity" and "free speech" may be difficult to draw. This proceeding, in short, hardly constituted a "trap for the innocent [like] the ancient law of Caligula." *United States v. Cardiff*, 344 U.S. 174, 176 (1952). The Gorelick defendants knew full-well that their conduct was inconsistent with the standards of the people of Indiana. As such, the Indiana RICO statute's application to "obscenity" ought to be upheld on its face in these proceedings against First and Fourteenth Amendment objections.

III. A PRETRIAL FREEZE ORDER THAT DOES NOT RESTRICT EXPRESSIVE CONDUCT IS NOT A CONSTITUTIONALLY IMPERMISSIBLE PRIOR RESTRAINT

The Hamilton County Circuit Court's pretrial freeze order did not constitute an impermissible prior restraint of free speech. Under this Court's seminal decision in *Near v. Minnesota*, 203 U.S. 697 (1931) (permanent injunction under nuisance statute against operation of anti-Semitic newspaper impermissible since prior restraint of free press), a prior restraint of a publication is, of course, unconstitutional. Such restraints, moreover, are

to be judged, not by their form, but by their effect. 203 U.S. at 708 (operation and effect of the statute in substance). *Vance v. Universal Amusement Co.*, 445 U.S. 308, 315 n.13 (1980); *New York Times Co. v. United States*, 403 U.S. 713, 719 (1971).

Goldsmith, however, proceeded at each step in this litigation against the Gorelick defendants in full compliance with the relevant constitutional safeguards for a seizure and a trial dealing with expressive materials. No objection can be validly lodged against the manner in which the detectives obtained their exhibits, since this Court's decision in *Maryland v. Macon*, 472 U.S. 463 (1985) expressly approved the undercover purchase of "obscenity". Even had the pre-trial order specifically restrained expressive conduct, an adversarial hearing prior to the order would not have been required, since a prompt judicial determination on the merits is all that is necessary, and one was set here for 72 hours after entry of the order. *See Southeastern Promotions Ltd. v. Conrad*, 420 U.S. 546, 558-62 (1975) (brief period with prompt hearing); *Heller v. New York*, 413 U.S. 403, 489-90 (1973) (permissible to have prompt hearing after initial seizure). Any delay in the hearing on the merits that occurred was wholly attributable to conduct on the part of the defendants; such delays are, of course, excludable from calculations of promptness. *Heller*, 413 U.S. at 490. A pre-trial order may, moreover, be obtained, as here, on a showing of probable cause. *Cf. New York v. P.J. Video*, 475 U.S. 868 (1986). The nature of the book stores may also be considered in determining the "obscenity" of the materials distributed. Here, the sexually explicit materials were sold in a store that featured live sex acts. (R. 17-18). It is well-established that the context of distribution may also be considered in determining "obscenity." *Splawn v. California*, 431 U.S. 595, 598-99 (1977); *Hamling v. United States*, 418 U.S. 87, 130 (1974). "Obscenity" may not, of course, be made a strict liability offense. *Smith v. California*, 362 U.S. 147

(1959). But, here, the individuals, who sold the material and ran the stores, were obviously knowledgeable about the character of the material that they were distributing to the public. (R. 118).

Indeed, expressive conduct was not even restricted by the pre-trial order that was obtained. The Court did not grant an order that restricted the Gorelick defendants' operation of their businesses. They were merely ordered not to dissipate their assets—other than in the normal course of business—prior to a final judgment.[38] The order entered relative to the unopened store was specifically qualified: "until further order of . . . [the] court." (A. 3). It was, in effect, little more than "another form of civil attachment." 479 N.E.2d 578, 607 (Conover, J., dissenting). Nothing in the record indicates that had the Gorelick defendants sought to use the expressive assets frozen that they would have been prevented from doing so. Nor does anything in the record indicate that the Court would not have allowed the defendants to open the unopened store or to have used the expressive materials in the store in the operation of their two other stores. In fact, the Court expressly permitted them to continue to operate the other two stores in the normal course of their business. (A. 3). As such, it was hardly unreasonable merely to freeze the *status quo*. *See Arizona v. Feld*, 745 P.2d 146, 154 (Az. App. 1987) ("the court . . . [may] restrain a defendant from moving inventory in its entirety"), *cert. denied*, 108 S. Ct. 270 (1988).

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[38] Recently, the Second Circuit upheld the granting of similar, but more far-reaching relief to the government under 18 U.S.C. § 1964: the imposition of a receivership. *See United States v. Ianniello*, 646 F. Supp. 1289, 1299-1300 (S.D.N.Y. 1986), *aff'd* 824 F.2d 203, 207-09 (2nd Cir. 1987). In *Ianniello*, the defendants *continued* to skim profits from a restaurant that was subject to a forfeiture order. 824 F.2d at 208 ("The District Court has considerable discretion to frame the scope of a receivership to meet the needs of the case").

This Court, moreover, has long recognized the general propriety of pre-trial orders that merely preserve the *status quo*. In *United States v. First Nat'l City Bank*, 379 U.S. 378, 385 (1965), this Court, for example, upheld a prejudgment sequestration. There, the government sought to enjoin a bank from transferring the property of the taxpayer, a Uruguayan corporation, to protect its jeopardy income tax assessment. The Court relied on *Deckert v. Independence Shares Corp.*, 311 U.S. 282 (1940). In *Deckert*, several purchasers had brought a suit in equity to rescind the fraudulent sale of securities and to obtain restitution. The monies necessary to satisfy the purchaser's claim were in the hands of a third-party trustee, named as a defendant, but not as violator. Noting that the violators' assets were "in danger of dissipation or depletion," 311 U.S. at 290, the Court upheld the asset freeze, observing that "the power to make the right of recovery effective implies the power to utilize any of the procedures or actions normally available to the litigant according to the exigencies of the particular case." *Id.* at 39. The issuance of the injunction was, therefore, a matter of "sound discretion" to be upheld on appeal absent "improvident exercise of judicial discretion." *Id.* at 290 (citations omitted). *See also, F.T.C. v. Dean Foods Co.*, 384 U.S. 597, 603-05 (1966) (preliminary injunction issued to prevent merger).

Traditionally, temporary restraining orders or preliminary injunctions have also been granted and upheld by circuit courts of appeals in a variety of situations, where their goal was to preserve the *status quo* pending the outcome of litigation. For example, in *Productos Carnic, S.A. v. Central Am. Beef & Seafood Trading Co.*, 621 F.2d 683, 687 (5th Cir. 1980), the Fifth Circuit upheld an order requiring that the proceeds of a sale be preserved in an interest-bearing account pending the final result of the litigation. The Court found that, without such an injunction, a substantial risk existed that a "meaningful decision on the merits would be impossible"

because defendants, by disposing of the assets, could make "any judgment ultimately obtained against [them] . . . unenforceable." *Id.* at 686. The Court held that the possibility of such an "ineffective remedy" outweighed the alleged damages that such an injunction might cause the defendants. *Id.* at 687. Similarly, in *International Control Corp. v. Vesco*, 490 F.2d 1334 (2d Cir.), *cert. denied*, 417 U.S. 932 (1974), the Second Circuit upheld an order preventing the dissipation or impairment of assets, which included a Boeing 707, ICC stocks, and a yacht. The Court concluded that while "an extraordinary remedy, a preliminary injunction is properly granted to preserve the status quo *pendente lite* . . . ." *Id.* at 1347.[39] Ac-

[39] *See also In Re Feit & Drexler, Inc.*, 760 F.2d 406 (2nd Cir. 1985) (bankruptcy trustee obtained interlocutory order refraining transfer of assets); *Mishkin v. Kenney & Branisel, Inc.*, 609 F. Supp. 1254, 1257 (S.D.N.Y.) (preliminary injunctive relief granted to prevent disposing of assets), *aff'd without opinion*, 779 F.2d 35 (2nd Cir. 1985).

These decisions, of course, reflect standard equity practice, which is subject to traditional English equity limitations. Nothing in the Constitution, however, tells Indiana that it may not authorize similar orders without toeing the line of such limitations. English law, too, is moving away from the older view. Historically, injunctions against persons to restrain the removal of assets were not permitted in English law under *Lister & Co. v. Stubbs* [1890] 45 Ch. D. I. The relevant materials are reviewed in *Rasu Maritime v. Pertambanga*, [1977] 3 A11.E.R. 324, 311 (Denning, J.). *Mareva v. International Bulkcarriers*, [1975] 2 Lloyds Rep. 509, marked a dramatic turn, for it upheld the issuance of injunctions to freeze assets. A new test was formulated in *Third Chandris Shipping v. Unimarine, S.A.*, [1979] 2 A11.E.R. 972, 984-85 (Denning, J.). While at first the new test seemed to be applicable only to international litigation, in *Barclay-Johnson v. Yuill*, [1909] 3 A11.E.R. 190, 194, it was made to rest solely on the "risk of removal of assets." The present state of English law, in which such injunctions are fairly easily obtained, is reflected in *Bayer A.G. v. Winter*, [1986] 1 A11.E.R. 733, 737. *See generally*, L. Denning, The Due Process of Law at 135-51 (1980) (discussion of *Mareva* injunctions); Profits of Crime and Their Recovery: Report of Howard League for Penal Reform 104-111 (1984) (discussion of *Mareva* injunctions). For a powerful critique of the traditional limitations from a historical, comparative and functional perspective that calls for reform, *see* Hammond, *Interlocutory Injunctions: Time For a New Model*, U. Toronto L.J. 240 (1980).

cordingly, no sound objection may be raised to the carefully crafted Hamilton County Circuit Court's pretrial freeze order.

IV. A CIVIL FORFEITURE SANCTION THAT APPLIES TO ASSETS ACQUIRED OR MAINTAINED BY UNLAWFUL CONDUCT IS NOT A CONSTITUTIONALLY IMPERMISSIBLE PRIOR RESTRAINT

Once it is seen that the incorporation of "obscenity" into Indiana RICO does not make the statute vague, the civil sanctions authorized by the statute may be properly

Freeze orders are particularly appropriate in RICO litigation, where the danger of dissipation of assets is ever present. *Forfeiture of Narcotics Proceeds* Hearings Before the Senate Subcomm. on Criminal Justice, Comm. on the Judiciary, 96th Cong., 2d Sess. 96-97, 114 (1980) (Deputy Assistant Attorney General, U.S. Department of Justice) (three problems: 1) ascertaining what the assets are, 2) reaching them if they are in the hands of third parties, and 3) preventing their dissipation before trial; problems compounded since "sophisticated criminals . . . have access to the best lawyers and accountants money can buy"); *Stronger Federal Effort Needed in Fight Against Organized Crime: Report by Comptroller General of the United States* 31-34 (1981) (problems in criminal forfeiture: 1) uncertain status of assets, 2) third party holdings, and 3) dissipation prior to seizure); *Asset Forfeiture—A Seldom Used Tool in Combatting Drug Trafficking, Report of Comptroller General of the United States* 30-42 (1981) (same). In fact, the need to protect assets subject to seizure is amply demonstrated by what occurred in this litigation after the issuance of the freeze order; Burton Gorelick was indicted and pled guilty to Federal RICO charges in an arson-insurance fraud scam that occurred while these proceedings were pending; he burned down World Video System; his interests in World Video System and the 4447 Corporation were then criminally forfeited to the United States. *See*, Order of June 5, 1987, *United States v. Burton H. Gorelick*, No. IP 86-29-CR-01 (United States District Court for the Southern District of Indiana).

evaluated under the relevant constitutional standards. "Obscenity" is not speech. After a proper judicial determination is made that expressive materials are "obscenity," any sanction imposed on the offender is not imposed on "speech". Labeling those sanctions as prior restraints mischaracterizes the issue. Indeed, after these proceedings, the Gorelick defendants would have been under "no restraint at all on the dissemination of particular materials since . . . [they would be] free to carry on . . . [their] book selling business" elsewhere using their other assets and the expressive materials not forfeited. *Arcara v. Cloud Books, Inc.*, 106 S. Ct. 3172, 3177 n.2 (1986). In contrast, the indirect impact of these sanctions must be examined, not as prior restraints, but under this court's jurisprudence following *United States v. O'Brien*, 391 U.S. 367 (1968). They should stand on no different footing than any other generally applicable governmental regulation or sanction. *See Arcara v. Cloud Books Inc.*, 106 S. Ct. 3172, 3175-76 (1986) (*O'Brien* controls statute that has "incidental effect of burdening" expressive conduct). Under *O'Brien*, the proposed civil sanctions are not unconstitutional on their face.

The imposition of the civil forfeiture sanction under the Indiana RICO statute in an "obscenity" case would not constitute an impermissible prior restraint of free speech. First, it is well-established that civil proceedings may be constitutionally employed in an effort to control "obscenity." *See, e.g., Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 55 (1973) (injunction); *Kingsley Books Inc. v. Brown*, 354 U.S. 436, 441-44 (1957) (injunction). The heightened protections because of the possibility of jail in the criminal process are, in short, not constitutionally compelled in "obscenity" litigation. *See, e.g., Cooper v. Mitchell Brother's Santa Ana Theatre*, 454 U.S. 90 (1981) (reasonable doubt standard not required); *Alexander v. Virginia*, 413 U.S. 836 (1973) (jury trial not required).

Second, the limited forfeiture sanctions at issue here were to be employed only "after a full adversary proceeding and a final judicial determination . . ." *Paris*, 413 U.S. at 55. The assets to be forfeited were limited to those required or maintained in violation of the law. As such, the effect of the various civil forfeitures would have been indistinguishable from the effect of a criminal fine, which is, of course, beyond question constitutional. *See Arcara v. Cloud Books, Inc.*, 106 S.Ct. 3172, 3177 (1986) (closure order not unconstitutional) ("every civil and criminal remedy imposes some conceivable burden on First Amendment protected activities."); *Vance v. Universal Amusement Co.*, 445 U.S. 308, 320, 324 (1980) (White J. and Rehnquist, J., dissenting); *Polykoff v. Collins*, 596 F. Supp. 584, (D. Ariz. 1984) (fine for "obscenity" not prior restraint), *aff'd*, 816 F.2d 1326 (9th Cir. 1987).[40]

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[40] This Court observed in *Arcara*:

> [R]espondents [whose bookstore was closed under a statute regulating prostitution] argue that the effect of the statutory closure remedy impermissibly burdens its First Amendment protected book selling activities. The severity of this burden is dubious at best, and is mitigated by the fact that respondents remain free to sell the same material at another location. In any event, this argument proves too much, since every civil and criminal remedy imposes some conceivable burden on First Amendment protected activities. One liable for a civil damages award has less money to spend on paid political announcements or to contribute to political causes, yet no one would suggest that such liability gives rise to a valid First Amendment claim. Similarly, a thief who is sent to prison might complain that his First Amendment right to speak in public places has been infringed because of the confinement, but we have explicitly rejected a prisoner's claim to a prison environment least restrictive of his desire to speak to outsiders. . . .
>
> It is true that the closure order in this case would require respondents to move their book selling business to another location. Yet we have not traditionally subjected every criminal and civil sanction imposed through legal process to "least

Third, the civil forfeiture sanction envisioned would not be otherwise objectionable, since it is consistent with the four-part test of *United States v. O'Brien*, 391 U.S. 367 (1968). Under *O'Brien*, such sanctions must fall within the constitutional power of a state; the regulation must further an important or substantial government interest; the governmental interest must be unrelated to the suppression of free expression; and the incidental restriction on free speech of the sanction must be no greater than necessary to further the governmental interest. *Id.* at 377.

No serious question can be raised about the first three points. *See Young v. American Mini Theatre Inc.*, 427 U.S. 81, 79-83 (1976) (Powell, J. concurring). States have, of course, power to control "obscenity", and its control furthers an important or substantial government interest. *See, e.g., Miller v. California*, 413 U.S. 18, 19 (1973). The interest in imposing the civil sanction for the unlawful distribution is, moreover, unrelated to constitutionally protected speech, since "obscenity" is not protected speech. *Id.* at 20. The issue turns, therefore, on assessing the incidental restriction of the sanction on future expressive conduct.

This Court in *United States v. Albertini*, 472 U.S. 675, 688-89 (1985), which involved an exclusion order issued on a military base, observed:

> restrictive means" scrutiny simply because each particular remedy will have some effect on the First Amendment activities of those subject to sanction. Rather, we have subjected such restrictions to scrutiny only where it was conduct with a significant expressive element that drew the legal remedy in the first place, as in *O'Brien*, or where a statute based on a nonexpressive activity has the inevitable effect of singling out those engaged in expressive activity . . . (citations omitted)

106 S. Ct. at 3177-78. Since the predicate offense here involved the sale of expressive material, it, of course, raises the *O'Brien* issue in an expressive context. *See id.* at 3178 (O'Connor, J., concurring) Nevertheless, the *O'Brien* test is fully met.

> Regulations that burden speech incidentally or control the time, place and manner of expression must be evaluated in terms of their general effect. [S]uch regulations [are not] invalid simply because there is some imaginable alternative that might be less burdensome on speech. Instead, an incidental burden on speech is no greater than is essential, and therefore is permissible under *O'Brien*, so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation. The validity of such regulations does not turn on a judge's agreement with the responsible decision-maker concerning the most appropriate method for promoting significant government interests. In *Community for Creative Non-Violence*, we observed that *O'Brien* does not assign to the judiciary the authority to replace the Park Service as the manager of the Nation's parks or endow the judiciary with the competence to judge how much protection of park lands is wise and how that level of conservation is to be attained. We are even less disposed to conclude that *O'Brien* assigns to the judiciary the authority to manage military facilities throughout the Nation (citations omitted).[41]

Obviously, controlling "obscenity" would be less effective if its purveyors could retain the assets acquired or maintained through their violations of the law. Recog-

[41] *Albertini* may not be distinguished on the grounds that it involved a military base in light of *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984). In *Clark*, demonstrators were prohibited from camping in certain public park areas as "expressive conduct" to draw attention to homelessness. While the court dealt with the regulation as a time, place and manner restriction, it recognized the relevance of an *O'Brien*-type analysis. 468 U.S. at 294 (*O'Brien* cited and relied upon); 298-300 (*O'Brien* is "little . . . different" and regulation "sustainable" under *O'Brien* test). It then upheld the regulations even though they impacted on expressive conduct in a public park. *Also see Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984). And a similar result, pre-*O'Brien*, was reached in *Minneapolis Star & Tribune v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983).

nizing this, the Indiana legislature has duly determined that the civil forfeiture of these assets is the most appropriate method for curtailing patterns of violations of its valid "obscenity" regulations. The purpose of the statute's forfeiture sanctions are, as the Indiana Supreme Court noted, "not to restrain the future distribution of presumptively protected speech but rather to disgorge assets" related to the racketeering activity. 504 N.E.2d at 565.[42] *But see Arizona v. Feld*, 745 P.2d 146, 155 (Ariz. App. 1987) (not seize bookshelves, etc.), *cert. denied*, 108 S. Ct. 1270 (1988). Under *Community for Creative Non-Violence* and *Albertini*, this Court ought not second-guess the judgment of the Indiana legislature. *See also*, *Calder v. Jones*, 465 U.S. 783, 790 (1984) ("potential chill on protected First Amendment activity . . . taken into account in the constitutional limitations on the substantive law"); *Near*, 283 U.S. at 716 ("the primary requirements of decency may be enforced against obscene publications"). As such, the civil forfeiture provisions of the Indiana statute ought not be condemned on their face under the First or Fourteenth Amendments.

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[42] Conceivably, a civil forfeiture sanction employed in the context of an "obscenity" offense might, in limited instances, be disproportionate to the underlying unlawful conduct. A similar criminal forfeiture would, of course, be subject to Eighth Amendment limitations. *Compare*, *United States v. Grande*, 620 F.2d 1026, 1037-39 (4th Cir. 1980) (RICO criminal forfeiture not facially in violation of the Fifth or Eighth Amendments), *cert. denied*, 449 U.S. 919 (1980) *with United States v. Busher*, 817 F.2d 1409, 1413-16 (9th Cir. 1987) (RICO criminal forfeitures may, in particular applications, violate the Eighth Amendment). A comparable analysis might well be appropriately applied in a civil proceeding that involved First Amendment interests. Its contours need not be explored here, however, since this appeal challenges the Indiana statute on its face. The facts of the appeal, moreover, indicate that the enterprise, whose assets would be subject to forfeiture, was solely in the business of the distribution of sexually explicit material similar to that which was made the subject of this litigation. What general due process-based proportionality limitations, if any, might be applicable to civil forfeiture sanctions under the First and Fourteenth Amendment may be left to another day—and a more fully developed argument and record.

V. A CIVIL DIVESTITURE, REVOCATION OF LICENSE AND FORFEITURE OF CORPORATE CHARTER ORDER BASED ON UNLAWFUL CONDUCT THAT DOES NOT RESTRICT FUTURE EXPRESSIVE CONDUCT IS NOT A CONSTITUTIONALLY IMPERMISSIBLE PRIOR RESTRAINT

Here, too, any evaluation on their face of the civil sanctions of divestiture, license suspension or revocation, and forfeiture of corporate charter authorized by Indiana RICO must proceed under the *O'Brien* test. These sanctions do not, in short, constitute prior restraints, since the defendants would be free to engage in expressive conduct in the future at other times and places. *Arcara v. Cloud Books, Inc.*, 106 S. Ct. 3172, 3177 n.2 (1986); *Young v. American Mini Theatres*, 427 U.S. 50, 62-63 (1976).

First, the sanction of divestiture is, of course, well-recognized. *See, e.g., United States v. DuPont & Co.*, 366 U.S. 316, 326-27 (1961) ("Divestiture is itself an equitable remedy designed to protect the public interest.") The proceeds realized from the divestiture remain with the defendants. Control of the assets divested merely passes to others. The defendants themselves would, therefore, be free to employ the proceeds in the future to engage in expressive conduct at any other time or place of their choosing.

Second, license suspension or revocation and forfeiture of corporate charters are also little more than a specialized form of occupational regulation. As early as 1898, the Court upheld a statute prohibiting a convicted felon from practicing medicine. *Hawker v. New York*, 170 U.S. 189, 194 (1898) ("character is as important a qualification as knowledge"). The only due process limitation is one of relatedness. *See, e.g., Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957) (past conduct unrelated to present fitness may not serve as present disqualification). Convicted felons may, for example, be barred from working on the water-front. *DeVeau v.*

Braisted, 363 U.S. 144 (1960); cf. *Brown v. Hotel & Restaurant Employees & Bartenders Union Local 54*, 468 U.S. 491 (1984) (regulation of union officials in casino industry). Civil disabilities are, moreover, evaluated against civil, not criminal, standards of due process. *Compare, Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963) *with Matthews v. Eldridge*, 424 U.S. 319, 335 (1976). As such, bookmakers may, for example, be excluded from race tracks. *See, e.g., Flores v. Los Angeles Turf Club*, 55 Cal.2d 736, 744, 361 P.2d 921, 925-26, 12 Cal. Rptr. 201, 205-06 (1961); *Mones v. Austen*, 318 F. Supp. 653 (S.D. Fla. 1970) Jockeys and trainers, too, may be excluded if they engage in misconduct. *Compare, State Racing Com'n v. McNanus*, 82 N.M. 108, 476 P.2d 767 (1970) (jockey) *with Hubel v. West Virginia Racing Ass'n.*, 513 F.2d 240 (4th Cir. 1975) (trainer).

The civil disabilities envisioned by Indiana RICO, however, are more limited than these types of regulations. If a state may bar a felon from practicing medicine, prevent a convict from working on the docks, or control access to race tracks by jockeys or trainers, it ought to be able to employ these *limited* sanctions in an effort to control "obscenity." Indeed, the defendants here are better off than a doctor, longshoreman, jockey or trainer who is prevented from working in their chosen field of endeavor. They are free to engage in expressive conduct, including selling books, in the future at other times and places. They merely have to divest *these* assets, have suspended or revoked *this* license, or forfeit *this* charter. They are free, of course, to use the proceeds of the divestiture to obtain another license or charter or to continue to engage in the same sort of conduct at other times and in other places. The sanctions merely serve to help assure that they will not again violate the law.[43] Here,

[43] Petitioner's claim that RICO is unconstitutional because of the incidental impact on speech would essentially require this Court to set aside the guilty plea in the related criminal RICO case which without involving obscenity at all resulted in a similar remedy. *See supra* note 39.

too, under *Albertini* and *Community for Creative Non-Violence*, the impact incidentally placed on expressive conduct in the future ought not be held impermissible. As such, these civil sanctions under Indiana's RICO also ought not be condemned on their face under the First or Fourteenth Amendments.

CONCLUSION

RICO legislation is a vital tool in the effort to curtail the infiltration of crime whether organized or not into legitimate business. Subject to appropriate constitutional restraints, the use of RICO in the "obscenity" area is a matter of legislative choice. Neither a properly circumscribed pretrial freeze order nor a properly circumscribed civil forfeiture and similar sanctions are constitutionally impermissible prior restraints on free speech. Accordingly, the judgment of the Indiana Supreme Court, insofar as it facially upholds Indiana's RICO statute and the conduct of Respondent Stephen Goldsmith under it, ought to be affirmed.

Respectfully submitted,

STEPHEN GOLDSMITH
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Marion County, Indiana
Indianapolis, Indiana 46204

July, 1988.

APPENDICES

APPENDIX A

STATUTES INVOLVED

CHAPTER 6. RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS

35-45-6-1 Definitions

Sec. 1. As used in this chapter:

"Documentary material" means any document, drawing, photograph, recording, or other tangible item containing compiled data from which information can be obtained or can be translated into a usable form.

"Enterprise" means a:

(1) sole proprietorship, corporation, partnership, business trust, or governmental entity; or

(2) union, association, or group, whether a legal entity or merely associated in fact.

"Pattern of racketeering activity" means engaging in at least two (2) incidents of racketeering activity that have the same or similar intent, result, accomplice, victim, or method of commission, or that are otherwise interrelated by distinguishing characteristics that are not isolated incidents; however, the incidents are a pattern of racketeering activity only if at least one (1) of the incidents occurred after August 31, 1980, and if the last of the incidents occurred within five (5) years after a prior incident of racketeering activity.

"Racketeering activity" means to commit, to attempt to commit, or to conspire to commit a violation, or aiding and abetting in a violation, of a provision of IC 23-2-1, or of a rule or order issued under IC 23-2-1; a violation of IC 35-47; a violation of IC 35-49-3; murder (IC 35-42-1-1); battery as a Class C felony (IC 35-42-2-1); kidnapping (IC 35-42-3-2); child exploitation (IC 35-

42-4-4); robbery (IC 35-42-5-1); arson (IC 35-43-1-1); burglary (IC 35-43-2-1); theft (IC 35-43-4-2); receiving stolen property (IC 35-43-4-2); forgery (IC 35-43-5-2); fraud (IC 35-43-5-4); bribery (IC 35-44-1-1); official misconduct (IC 35-44-1-2); conflict of interest (IC 35-44-1-3); perjury (IC 35-44-2-1); tampering (IC 35-44-3-4); intimidation (IC 35-45-2-1); promoting prostitution (IC 35-45-4-4); promoting professional gambling (IC 35-45-5-4); dealing in cocaine or a narcotic drug (IC 35-48-4-1); dealing in a schedule I, II, or III controlled substance (IC 35-48-4-2); dealing in a schedule IV controlled substance (IC 35-48-4-3); dealing in a schedule V controlled substance (IC 35-48-4-4); or dealing in marijuana, hash oil, or hashish (IC 35-48-4-10). *As added by Acts 1980, P.L. 199, SEC 2. Amended by P.L. 190-1984, SEC. 1.*

35-45-6-2 Corrupt business influence

Sec. 2. (a) A person:

(1) who has knowingly or intentionally received any proceeds directly or indirectly derived from a pattern of racketeering activity, and who uses or invests those proceeds or the proceeds derived from them to acquire an interest in real property or to establish or to operate an enterprise;

(2) who through a pattern of racketeering activity, knowingly or intentionally acquires or maintains, either directly or indirectly, an interest in or control of real property or an enterprise; or

(3) who is employed by or associated with an enterprise, and who knowingly or intentionally conducts or otherwise participates in the activities of that enterprise through a pattern of racketeering activity;

commits corrupt business influence, a Class C felony. *As added by Acts 1980, P.L. 199, SEC. 2.*

CHAPTER 30.5. CIVIL REMEDIES FOR RACKETEERING ACTIVITY

34-4-30.5-1 Definitions

Sec. 1. As used in this chapter:

"Aggrieved person" means a person who has an interest in real property or in an enterprise that:

(1) is the object of corrupt business influence (IC 35-45-6-2); or

(2) has suffered damages or harm as a result of corrupt business influence (IC 35-45-6-2).

"Enterprise" means the same as the definition of that term found in IC 35-45-6-1. *As added by Acts 1980, P.L.199, SEC.1. Amended by P.L.308-1985, SEC.1.*

34-4-30.5-2 Injunctive relief from corrupt business influence; action by prosecuting attorney

Sec. 2. The prosecuting attorney in a county in which the violation occurs, may bring an action to enjoin a violation of IC 35-45-6-2. An action under this section may be brought in any circuit or superior court in a county in which the violation occurs. If the court finds by a preponderance of the evidence that a violation of IC 35-45-6-2 has occurred, it may:

(1) order a defendant to divest himself of any interest in any enterprise or real property;

(2) impose reasonable restrictions upon the future activities or investments of a defendant, including prohibiting a defendant from engaging in the same type of endeavor as the enterprise in which he was engaged in violation of IC 35-45-6-2;

(3) order the dissolution or reorganization of any enterprise;

(4) order the suspension or revocation of a license, permit, or prior approval granted to any enterprise by any agency of the state;

(5) order the forfeiture of the charter of a corporation organized under the laws of Indiana, or the revocation of a certificate authorizing a foreign corporation to conduct business within the state, upon finding that the board of directors or a managerial agent acting on behalf of the corporation, in conducting the affairs of the corporation, has authorized or engaged in conduct in violation of IC 35-45-6-2 and that, for the prevention of future criminal activity, the public interest requires the charter of the corporation forfeited and the corporation dissolved or the certificate revoked; and

(6) make any other order or judgment that the court considers appropriate.

In any order or judgment made by the court under this section, the judge shall make due provision for the rights of innocent persons. *As added by Acts 1980, P.L. 199, SEC. 1.*

34-4-30.5-3 Action for forfeiture of property incident to corrupt business influence; orders for forfeiture and seizure

Sec. 3. (a) The prosecuting attorney in a county in which any of the property is located, may bring an action for the forfeiture of any property used in the course of, intended for use in the course of, derived from, or realized through, conduct in violation of IC 35-45-6-2. An action for forfeiture may be brought in any circuit or superior court in a county in which any of the property is located. Upon a showing by a preponderance of the evidence that the property in question was used in the course of, intended for use in the course of, derived from, or realized through, conduct in violation of IC 35-45-6-2,

the court shall order the property forfeited to the state, and shall specify the manner of disposition of the property including the manner of disposition if the property is not transferable for value. The court shall order forfeitures and dispositions under this section with due provision for the rights of innocent persons.

(b) When an action is filed under subsection (a), the prosecutor may move for an order to have property subject to forfeiture seized by a law enforcement agency. The judge shall issue such an order upon a showing of probable cause to believe that a violation of IC 35-45-6-2 involving the property in question has occurred. *As added by Acts 1980, P.L.199, SEC.1.*

34-4-30.5-4 Seizure of property subject to forfeiture; requisites; custody; limitation of actions

Sec. 4. (a) Property subject to forfeiture under this chapter shall be seized by a law enforcement officer upon court order. Seizure may be made without court order only if:

(1) the seizure is incident to a lawful arrest or search, or to an inspection under an administrative inspection warrant; or

(2) the property subject to seizure has been the subject of a prior judgment in favor of the state in a forfeiture proceeding under this chapter.

(b) When property is seized under subsection (a), pending forfeiture and final disposition, the law enforcement officer making the seizure may:

(1) place the property under seal;

(2) remove the property to a place designated by the court; or

(3) require another agency authorized by law to take custody of the property and remove it to an appropriate location.

(c) Property seized under subsection (a) is not subject to replevin, but is considered to be in the custody of the law enforcement officer making the seizure, subject only to order of the court. However, if a seizure of property is made in accordance with subsection (a), the prosecuting attorney shall promptly bring an action for forfeiture under section 3 of this chapter. If an action is not filed within 180 days after the date of the seizure, the law enforcement agency whose officer made the seizure shall return the property to its owner. *As added by Acts 1980, P.L. 199, SEC. 1.*

34-4-30.5-5 Injunctive relief and damages from corrupt business influence; actions by aggrieved persons; jury trial; right to forfeited property; state as aggrieved person

Sec. 5. (a) An aggrieved person may bring an action for injunctive relief from corrupt business influence in a circuit or superior court in the county of the aggrieved person's residence, or in a county where any of the affected real property or the affected enterprise is located. If the court finds, through a preponderance of the evidence, that the aggrieved person is suffering from corrupt business influence, it shall make an appropriate order for injunctive relief. This order must be made in accordance with the principles that govern the granting of injunctive relief from threatened loss or damage in other civil cases, except that a showing of special or irreparable damage to the aggrieved person is not required. The court may order injunctive relief only after the execution of a bond by the aggrieved person for an injunction improvidently granted, in an amount established by the court. In addition, the court may order a temporary restraining order or a preliminary injunction, but only after a showing of immediate danger of significant loss or damage to the aggrieved person.

(b) An aggrieved person may bring an action against a person who has violated IC 35-45-6-2 in a circuit or

superior court in the county of the aggrieved person's residence, or in a county where any of the affected real property or the affected enterprise is located, for damages suffered as a result of corrupt business influence. Upon a showing by a preponderance of the evidence that the aggrieved person has been damaged by corrupt business influence, the court shall order the person causing the damage through a violation of IC 35-45-6-2 to pay to the aggrieved person:

(1) An amount equal to three (3) times his actual damages;

(2) The costs of the action;

(3) A reasonable attorney's fee; and

(4) Any punitive damages awarded by the court and allowable under law.

(c) The defendant and the aggrieved person are entitled to a trial by jury in an action brought under this section.

(d) An aggrieved person has a right or claim to forfeited property or to the proceeds derived from forfeited property superior to any right or claim the state has in the same property or proceeds.

(e) If the state is an aggrieved person, the attorney general has concurrent jurisdiction with the prosecuting attorney to bring an action under this section. [IC 34-4-30.5-5, as added by Acts 1980, P.L. 199, § 1; P.L. 308-1985, § 2.]

34-4-30.5-6 Collateral estoppel; criminal proceeding

Sec. 6. In any action brought under this chapter, the principle of collateral estoppel operates to bar relitigation of the issues previously determined in a criminal proceeding under IC 35-45-6-2. *As added by Acts 1980, P.L. 199, SEC. 1.*

ARTICLE 49
OBSCENITY AND PORNOGRAPHY

Ch. 1. Definitions.

Ch. 2. General Provisions.

Ch. 3. Crimes.

Chapter 1. Definitions.

35-49-1-1. Definitions applicable throughout article.

Sec. 1. The definitions in this chapter apply throughout this article.

35-49-1-2. "Distribute".

"Distribute" means to transfer possession for a consideration.

35-49-1-3. "Matter".

"Matter" means:

(1) Any book, magazine, newspaper, or other printed or written material;

(2) Any picture, drawing, photograph, motion picture, or other pictorial representation;

(3) Any statue or other figure;

(4) Any recording, transcription, or mechanical, chemical, or electrical reproduction; or

(5) Any other articles, equipment, machines, or materials.

35-49-1-4. "Minor".

"Minor" means any individual under the age of eighteen [18] years.

35-49-1-5. "Nudity".

"Nudity" means:

(1) The showing of the human male or female genitals, pubic area, or buttocks with less than a full opaque covering;

(2) The showing of the female breast with less than a fully opaque covering of any part of the nipple; or

(3) The depiction of covered male genitals in a discernibly turgid state.

35-49-1-6. "Owner".

"Owner" means any person who owns or has legal right to possession of any matter.

35-49-1-7. "Performance".

"Performance" means any play, motion picture, dance, or other exhibition or presentation, whether pictured, animated, or live, performed before an audience of one (1) or more persons.

35-49-1-8. "Sado-masochistic abuse".

"Sado-masochistic abuse" means flagellation or torture by or upon a person as an act of sexual stimulation or gratification.

35-49-1-9. "Sexual conduct".

"Sexual conduct" means:

(1) Sexual intercourse or deviate sexual conduct;

(2) Exhibition of the uncovered genitals in the context of masturbation or other sexual activity;

(3) Exhibition of the uncovered genitals of a person under sixteen [16] years of age;

(4) Sado-masochistic abuse; or

(5) Sexual intercourse or deviate sexual conduct with an animal.

35-49-1-10. "Sexual excitement".

"Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

Chapter 2. General Provisions.

35-49-2-1. Obscene matter or performance.

A matter or performance is obscene for purposes of this article if:

(1) The average person, applying contemporary community standards, finds that the dominant theme of the matter or performance, taken as a whole, appeals to the prurient interest in sex;

(2) The matter of performance depicts or describes, in a patently offensive way, sexual conduct; and

(3) The matter or performance, taken as a whole, lacks serious literary, artistic, political, or scientific value.

35-49-2-2. Matter of performance harmful to minors.

A matter or performance is harmful to minors for purposes of this article if:

(1) It describes or represents, in any form, nudity, sexual conduct, sexual excitement, or sado-masochistic abuse;

(2) Considered as a whole, it appeals to the prurient interest of sex of minors;

(3) It is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable matter for or performance before minors; and

(4) Considered as a whole, it lacks serious literary, artistic, political, or scientific value for minors.

35-49-2-3. Arrest; search; seizure of matter; motion pictures.

(a) Whenever a person:

(1) Offers matter for distribution to the public as stock-in-trade of a lawful business or activity; or

(2) Exhibits matter at a commercial theater showing regularly scheduled performances to the general public; the person may be arrested under this article only if the arresting officer has first obtained an arrest warrant, and matter may be seized as evidence only if a search warrant has first been obtained.

(b) The quantity of matter seized may encompass no more than is reasonable and necessary for the purpose of obtaining evidence.

(c) If:

(1) The subject of a seizure under this chapter is a motion picture that is allegedly harmful to minors; and

(2) The defendant or owner of the motion picture proves that other copies of the motion picture are not available for exhibition;

the court shall order that the defendant or owner may, at his own expense, copy the motion picture and continue showing the motion picture to adults pending a preliminary determination under section 4(b) of this chapter.

35-49-2-4. Adversary hearing; application for; preliminary determination.

(a) Within ten [10] days after:

(1) Matter is obtained by seizure or by purchase under this article; or

(2) The defendant is arrested under this article;

whichever is later, and before trial, the state, the defendant, an owner, or any other party in interest of any

matter seized or purchased may apply for and obtain a prompt adversary hearing for the purpose described in subsection (b).

(b) At the adversary hearing, the court shall make a preliminary determination of whether the matter is:

(1) probably obscene; or

(2) probably harmful to minors.

35-49-2-5. Application of article.

This article does not limit the power of political subdivisions to adopt or enforce zoning ordinances regulating the use of real property.

Chapter 3. Crimes.

35-49-3-1. Sale or distribution or exhibition of obscene matter.

A person who knowingly or intentionally:

(1) Sends or brings into Indiana obscene matter for sale or distribution; or

(2) Offers to distribute, distributes, or exhibits to another person obscene matter;

commits a class A misdemeanor. However, the offense is a class D felony if the obscene matter depicts or describes sexual conduct involving any person who is or appears to be under sixteen (16) years of age.

35-49-3-2. Obscene performance.

A person who knowingly or intentionally engages in, participates in, manages, produces, sponsors, presents, exhibits, photographs, films, or videotapes any obscene performance commits a class A misdemeanor. However, the offense is a class D felony if the obscene performance depicts or describes sexual conduct involving any person who is or appears to be under sixteen (16) years of age.

35-49-3-3. Dissemination of matter or conducting performance harmful to minors.

A person who knowingly or intentionally:

(1) Disseminates matter to minors that is harmful to minors;

(2) Displays matter that is harmful to minors in an area to which minors have visual, auditory, or physical access, unless each minor is accompanied by his parent or guardian;

(3) Sells or displays for sale to any person matter that is harmful to minors within five hundred (500) feet of the nearest property line of a school or church;

(4) Engages in or conducts a performance before minors that is harmful to minors;

(5) Engages in or conducts a performance that is harmful to minors in an area to which minors have visual, auditory, or physical access, unless each minor is accompanied by his parent or guardian;

(6) Misrepresents his age for the purpose of obtaining admission to an area from which minors are restricted because of the display of matter or a performance that is harmful to minors; or

(7) Misrepresents that he is a parent or guardian of a minor for the purpose of obtaining admission of the minor to an area where minors are being restricted because of display of matter or performance that is harmful to minors;

commits a class A misdemeanor.

35-49-3-4. Defense to prosecution for dissemination of matter or conducting performance harmful to minors.

It is a defense to a prosecution under section 3 [35-49-3-3]of this chapter for the defendant to show:

(1) That the matter was disseminated or that the performance was performed for legitimate scientific or educational purposes;

(2) That the matter was disseminated or displayed to or that the performance was performed before the recipient by a bona fide school, museum, or public library that qualifies for certain property tax exemptions under IC 6-1.1-10, or by an employee of such a school, museum, or public library acting within the scope of his employment;

(3) That he had reasonable cause to believe that the minor involved was eighteen [18] years old or older and that the minor exhibited to the defendant a draft card, driver's license, birth certificate, or other official or apparently official document purporting to establish that the minor was eighteen [18] years old or older; or

(4) That he was a salesclerk, motion picture projectionist, usher, or ticket taker, acting within the scope of his employment and that he had no financial interest in the place where he was so employed.

APPENDIX B

STATE OF INDIANA)
) ss:
COUNTY OF MARION)

IN THE CIRCUIT COURT OF MARION COUNTY

Cause No. C83 1788

STEPHEN GOLDSMITH, PROSECUTING ATTORNEY FOR NINETEENTH JUDICIAL CIRCUIT,
Plaintiff

vs.

4447 CORPORATION, WORLD VIDEO SYSTEMS, INC., ISSI THEATRE INC., BURTON GORELICK d/b/a ADULT TOY AND GIFT, DISK DEVELOPMENT, BURKE MENDENHALL, IVAN CHALFIE, HENRY KAHN, BARBARA BYRNES, HERBERT ALLEN, JAMES LEWELLYN, ROGER SUMMERS, EUGENE YARMY, GEORGIA MYERS, HERB TROUT, PLAZA ENTERTAINMENT CENTER, CYNTHIA SMITH, LAURIE JACOBS, WILLIAM E. LONG, ROBERT BEAMAN,
Defendants.

FINDINGS OF FACT AND ORDER

Comes now the Court on Plaintiff's Verified Petition for *Seizure of Property Subject to Forfeiture*, and being duly advised in the premises now finds and orders as follows:

1. Plaintiff Stephen Goldsmith is the duly elected prosecutor of this judicial circuit.

2. IC 34-4-30.5-2 and IC 34-4-30.5-3 authorizes the prosecuting attorney in a county in which a violation of

IC 35-45-6-2 occurs to bring an action for injunctive relief and forfeiture of property involved in such violation.

3. As a governmental agent, the prosecuting attorney is not required to post bond for such relief.

4. Defendants as recited in the Complaint are involved in the Burton Gorelick Enterprise.

5. There is probable cause to believe the defendants have violated the provisions of IC 35-45-6-2.

6. There is probable cause that the establishment at 6755 East 38th Street, Marion County, and known as Adult Toy and Gift is in violation of IC 35-45-6-2.

7. There is probable cause to believe the establishment at 4447 North Keystone, Marion County, Indiana, know as World Video Systems is in violation of IC 35-45-6-2.

8. Property at 4276 West 38th Street, and at the two establishments set out in paragraphs 6 and 7 above are subject to forfeiture.

Now therefore, it is ordered as follows:

1. The Indianapolis Police Department shall forthwith lock, *seal and secure* all property within the commercial building at 4276 West 38th Street, Marion County. Such building shall remain sealed until further order of this court.

2. Defendants shall preserve all property at World Video Systems, 4447 North Keystone, Indianapolis, Marion County, Indiana, and at Adult Toy and Gift, 6755 East 38th Street, Indianapolis, Marion County, Indiana until further order of this court. Defendants shall not transfer or remove from said buildings any fixtures, cabinets, cameras, audio or video equipment, cash registers or other property until further order of this court. This paragraph shall not prevent defendants at Adult Toy and Gift and World Video Systems from transferring or selling books, magazines, newspapers or video

tapes. However, until further order of this court, all other property shall be held by Defendants.

3. Defendants shall immediately list and state the location of all property, real and personal, including money, that Defendants own or have title to or any right, interest or equity in.

4. A trial on Plaintiff's request that all assets at all three stores shall be forfeited is now set for 9:00 a.m. Thursday, August 4, 1983. Defendants shall bring with them all records referred to in paragraph 3 above.

SO ORDERED this 1st day of August, 1983.

/s/ Anthony J. Metz
Judge
Marion Circuit Court